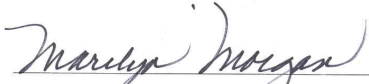




The following constitutes  
the order of the court. Signed November 20, 2006

  
Marilyn Morgan  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re:

**HECTOR RESTO-PEREZ and SANDRA  
RESTO-PEREZ,**

Debtors.

Case No. 06-52224-MM

Chapter 13

**MEMORANDUM DECISION AND  
ORDER ON DEBTOR'S MOTION TO  
CONTINUE THE AUTOMATIC STAY  
AS TO ALL CREDITORS**

**INTRODUCTION**

Before the court is the debtors' motion for continuation of the automatic stay pursuant to § 362(c)(3). For the reasons set forth, the motion is granted.

**FACTUAL BACKGROUND**

The debtors had one prior case dismissed within the year. They filed a chapter 13 petition on August 29, 2003, their chapter 13 plan that provided a 6% distribution to unsecured creditors was confirmed on November 20, 2003, and the case was dismissed on August 22, 2006 when they defaulted on the confirmed plan. The reason that the debtors missed their plan payments is that they incurred unanticipated medical expenses and experienced a reduction in disposable income because of related unpaid time off. The debtor wife required emergency medical treatment that was followed by an extended hospital stay. The medical condition required that the debtor husband take unpaid time off to

1 care for his wife and their two minor children. The medical expenses and the related reduction in  
2 disposable income precluded the debtors from making their plan payments.

3 Two and a half months following the dismissal of their prior case, the debtors filed this case to  
4 protect their vehicle, which is the family's sole mode of transportation. The debtors' proposed chapter  
5 13 plan does not provide for modification of any secured debt. Since the prior case, circumstances have  
6 changed in that the debtors do not anticipate any future medical expenses or issues like the ones that  
7 frustrated their ability to perform under their plan in the prior case. Both debtors are in good health.  
8 The debtor husband is a computer technician for a bank, and the debtor wife is a homemaker. His  
9 employment of two years is stable.

10  
11 **LEGAL DISCUSSION**

12 Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), the  
13 automatic stay terminates on the thirtieth day after the petition if the debtor had one prior petition  
14 pending in the preceding year. Sections 362(c)(3)(B) & (C) provide:

- 15 (3) [I]f a single or joint case is filed by or against debtor who is an individual in a  
16 case under chapter 7, 11, or 13, and if a single or joint case of the debtor was  
17 pending within the preceding 1-year period but was dismissed, other than a case  
18 refiled under a chapter other than chapter 7 after dismissal under § 707(b) –

19 \* \* \*

- 20 (B) on the motion of a party in interest for continuation of the automatic stay and  
21 upon notice and a hearing, the court may extend the stay in particular cases as to  
22 any or all creditors (subject to such conditions or limitations as the court may  
23 impose) after notice and a hearing completed before the expiration of the 30-day  
24 period only if the party in interest demonstrates that the filing of the later case is  
25 in good faith as to the creditors to be stayed; and

- 26 (C) for purposes of subparagraph (B), a case is presumptively filed not in  
27 good faith (but such presumption may be rebutted by clear and  
28 convincing evidence to the contrary) –

(i) as to all creditors, if –

(I) more than 1 previous case under any of chapter 7, 11, and 13 in which  
the individual was a debtor was pending within the preceding 1-year;

(II) a previous case under any of chapters 7, 11, and 13 in which the  
individual was a debtor was dismissed within such 1-year period, after  
the debtor failed to –

(aa) file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court; or  
(cc) perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 or any other reason to conclude that the later case will be concluded –

(aa) if a case under chapter 7, with a discharge; or

(bb) if a case under chapter 11 or 13, with a confirmed plan that will be fully performed. . . .

Under this section, the automatic stay terminates on the thirtieth day after the filing of a second case when an individual has been a debtor in a prior bankruptcy case pending within the preceding one-year period. However, the debtor may seek a continuation of the stay beyond the original thirty day period if:

- 1) a motion is filed;
- 2) there is notice and a hearing;
- 2) the hearing is held before the expiration of the original 30-day period; and
- 3) the debtor proves that the filing of the new case is in good faith as to the creditors to be stayed.

In re Castaneda, 342 B.R. 90, 93 (Bankr. S.D. Cal. 2006). The moving party bears the burden of proof of these requirements. Id. at 94.

There is a rebuttable presumption that the second case is not filed in good faith if:

- 1) the debtor had more than one case pending in the preceding year;
- 2) the first case was dismissed because the debtor failed to:
  - a. file or amend the petition or other documents without substantial excuse;
  - b. provide court-ordered adequate protection, or
  - c. perform the terms of a confirmed plan.
- 3) or there is no substantial change in the debtor's affairs and no other reason to believe the case will result in a fully performed chapter 13 plan.

Id. The presumption of the absence of good faith can only be rebutted by clear and convincing

evidence. § 362(c)(3)(C). However, the burden is reduced to a preponderance of the evidence if there is no presumption of bad faith. In re Montoya, 342 B.R. 312, 316 (Bankr. S.D. Cal. 2006). The burden of establishing that the presumption of bad faith applies to the case is on the objecting creditor. Id.

To determine whether the debtor has established the requisite good faith under § 362(c)(3), courts have looked to the totality of the circumstances. In re Ball, 336 B.R. 268, 274 (Bankr. M.D.N.C. 2006); In re Galanis, 334 B.R. 685, 693 (Bankr. D. Utah 2005). Courts look specifically at the same factors for determining good faith in confirmation of a chapter 13 plan, as well as to the objective futility of the case and the subjective bad faith of the debtor. In re Mark, 336 B.R. 260, 267 (Bankr. D.Md. 2006). In this circuit, those factors are set forth in In re Warren, 89 B.R. 87, 93 (BAP 9<sup>th</sup> Cir. 1988), as follows:

1. The amount of the proposed payments and the amounts of the debtor's surplus;
2. The debtor's employment history, ability to earn, and likelihood of future increases in income;
3. The probable or expected duration of the plan;
4. The accuracy of the plan's statements of the debts, expenses and percentage of repayment of unsecured debt, and whether any inaccuracies are an attempt to mislead the court;
5. The extent of preferential treatment between classes of creditors;
6. The extent to which secured claims are modified;
7. The type of debt sought to be discharged, and whether any such debt is nondischargeable in Chapter 7;
8. The existence of special circumstances such as inordinate medical expenses;
9. The frequency with which the debtor has sought relief under the Bankruptcy Reform Act;
10. The motivation and sincerity of the debtor in seeking Chapter 13 relief; and
11. The burden which the plan's administration would place upon the trustee.

A number of courts, recognizing that certain factors, such as the type of debt and the debtor's conduct in the second case, are less significant under the more limited superdischarge under the BAPCPA, have modified the test for good faith to include additional factors:

1. the timing of the petition;
2. how the debt(s) arose;
3. the debtor's motive in filing the 2<sup>nd</sup> petition;

4. how the debtor's actions affected creditors;
5. why the debtor's prior case was dismissed;
6. the likelihood that the debtor will have a steady income throughout the bankruptcy case, and will be able to fund a plan; and
7. whether the trustee or creditors object to the motion to continue the stay.

See In re Baldassaro, 338 B.R. 178, 188 (Bankr. D.N.H. Feb. 24, 2006); In re Ball, 336 B.R. 268, 274 (Bankr. M.D.N.C. 2006); In re Havner, 336 B.R. 98, 103 (Bankr. M.D.N.C. 2006); In re Galanis, 334 B.R. 685, 693 (Bankr. D. Utah 2005); In re Montoya, 333 B.R. 449, 457-58 (Bankr. D. Utah 2005). These factors are neither weighted nor exhaustive. Montoya, 333 B.R. at 458. Where no presumption of bad faith arises, and no party objects, a request to extend the stay should be liberally granted. In re Warneck, 336 B.R. 181, 182 (Bankr. S.D.N.Y. 2006).

Here, the presumption of the lack of good faith arises because the previous case was dismissed for failure to perform under the terms of a confirmed plan. However, the debtors have met their burden of showing that this case was filed in good faith. The circumstances supporting this finding are as follows:

| <u>Warren Factors</u>  |  |
|--|--|
| 1. The amount of the proposed payments and the amounts of the debtor's surplus;  | The debtors are contributing all of their disposable income in the amount of \$210 to the plan and are complying with the payment requirements set forth in § 1325(b).   |
| 2. The debtor's employment history, ability to earn, and likelihood of future increases in income;   | The debtor husband has been employed as a computer technician for the same employer, a bank, for two years. His employment is stable, and he expects to receive pay increases as his tenure increases.           |
| 3. The probable or expected duration of the plan;  | The plan is a 60-month plan.   |
| 4. The accuracy of the plan's statements of the debts, expenses and percentage of repayment of unsecured debt, and whether any inaccuracies are an attempt to mislead the court; | There have been no assertions that the schedules are inaccurate. The proposed plan provides that unsecured creditors will receive no distribution under the plan. This factor weighs against the debtors' favor. |

|   |  |
|---|--|
| 5. The extent of preferential treatment between classes of creditors;                                     | There is no preferential treatment between classes of creditors.   |
| 6. The extent to which secured claims are modified;   | Secured claims are not modified under the plan.  |
| 7. The type of debt sought to be discharged, and whether any such debt is non-dischargeable in Chapter 7; | There are no debts that would be non-dischargeable in a chapter 7.   |
| 8. The existence of special circumstances such as inordinate medical expenses;                            | The debtors defaulted under the plan payments in their prior case because they incurred unanticipated medical expenses when the debtor wife required emergency medical treatment that was followed by an extended hospital stay. The debtor husband was required to take unpaid time off to care for her and their two minor children, resulting in a reduction of their disposable income available to fund the plan. |
| 9. The frequency with which the debtor has sought relief under the Bankruptcy Reform Act;                 | There was only one prior case pending.   |
| 10. The motivation and sincerity of the debtor in seeking Chapter 13 relief;                              | The debtors have expressed a sincere intention to successfully complete their chapter 13 plan. They submit that the case was filed in good faith.  |
| 11. The burden which the plan's administration would place upon the trustee.                              | This case would not impose any undue administrative burden on the Trustee's office.  |
| <b><u>Baldassaro Factors</u></b>  |  |
| 1. The timing of the petition;  | The debtors commenced this case within two and a half months of the dismissal of their prior case.   |
| 2. How the debt(s) arose;   | The debts in this case are substantially the same as those in the prior case, except that the debtors have incurred additional medical expenses.   |
| 3. Debtor's motive in filing the 2 <sup>nd</sup> petition;  | The debtors filed this case to protect their vehicle.  |
| 4. How the debtor's actions affected creditors;   | Creditors in this case would be affected by a continuation of the stay. This factors weighs against the debtors' favor.  |

|   |   |  |
|---|---|--|
| 1 | 5. Why the debtor's prior case was dismissed;     | <i>[Already addressed in #5 above.]</i>  |
| 2 | 6. The likelihood that the debtor will have a     | Circumstances have changed in that the debtor<br>do not anticipate any future medical expenses<br>or issues like the ones that resulted in the<br>dismissal of the prior case. They are both in<br>good health, and the debtor husband has stable<br>employment. |
| 3 | steady income throughout the bankruptcy case,     |  |
| 4 | and will be able to fund a plan;                  |  |
| 5 |   |  |
| 6 | 7. Whether the trustee or creditors object to the | Finally, there are no objections to the debtors'<br>motion.  |
| 7 | motion to continue the stay.                      |  |

8  
9  
10 **CONCLUSION**

11 For the reasons set forth above, the debtors' motion to continue the automatic stay is granted.

12 Good cause appearing, IT IS SO ORDERED.

13  
14 **\* \* \* END OF ORDER \* \* \***  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Case No. 06-52224

**SERVICE LIST**

RODNEY M KLEMAN  
TREVOR R MIRKES  
400 CAMINO EL ESTERO  
MONTEREY CA 93940